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STYROBILT SDN. BHD.

v.

KUMPULAN KIM HUAT (SIN KEE) SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR

ZAKARIA YATIM J

b

[COMPANIES WINDING-UP NO. D4-28-366-89]

21 JUNE 1990

COMPANY LAW: Winding-up - Unable to pay debts - Other creditors taken into account - Best interests - Section 218(a), (2) Companies Act 1965.

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CIVIL PROCEDURE: Exhibits to affidavit - 'Without prejudice' - Whether privileged - Whether settlement between parties.

On 27 June 1989 the petitioner S issued a s. 218(2)(a) of the Companies Act (the Act) notice to the respondent company K. On 25 August 1989 S obtained judgment against K. On 20 October 1989 a bank draft for the amount was sent to S, K contending that this payment was in response to a letter among others written by S's solicitor on 11 September 1989.

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S submitted that these correspondence between the parties was inadmissible as they were privileged documents as they formed part of a chain of correspondence originating from the first letter of 24 July 1989 which was marked "without prejudice". The Court also had to determine, taking into consideration the wishes of the other creditors, whether the company would be able to pay its debts.

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Held:

[1] The letters exhibited to the affidavit of Counsel for K were privileged documents which are however admissible if both parties have reached a settlement.

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[2] On the facts of this case, no settlement was reached between the parties; the company failed to comply with the terms stated in the letter dated 11 September 1989 written by the S's solicitors. As K failed to pay the amount in the notice within the 21 days, K is deemed to be unable to pay its debts under s. 218(2) of the Act.

[3] In considering whether K is able to pay its debts the Court must not ignore the other creditors of K; when petition was filed by it was not for his own benefit but for the benefit of the other creditors as well - see *In re Grigglestone Coal Co. Ltd.*

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[4] Although K does own a piece of industrial land, notwithstanding the charge on the land, even if the land was sold, the proceeds would not be sufficient to pay all its creditors. It is in the best interests of the majority of the creditors of a winding-up order was made.

[Order accordingly.]

Cases referred to:

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Malayan Banking Berhad v. Foo Seen Moi [1981] 2 MLJ 17

Re Grigglestone Coal Company Ltd. [1905] 2 Ch 327

Legislation referred to:

Companies Act 1965, s. 218(2)(a)

For the petitioner - Mohd. Nasrim bin Datuk Mohd. Salleh; M/s. Yip Yeo & Nasrim

For the respondent and mentions for one opposing creditor - R.V. Lingam

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For the Gunac Enterprise - Yean

For creditor opposing petition - G.S. Mani

JUDGMENT

Zakaria Yatim J:

In this petition, the petitioner, Styrobilt Sdn. Bhd., is seeking the order of the Court to wind up the respondent company, Kumpulan Kim Huat (Sin Kee) Sdn. Bhd. (hereinafter referred to as “the company”), on the ground that the company was unable to pay its debts.

The company was incorporated on 13 February 1986 under the Companies Act. It’s registered office is at No. 12-C, Medan Kidd, 30200 Ipoh, Perak. Its paid-up capital is RM500,000.

On 25 August 1989, the petitioner obtained judgment against the company in the sum of RM23,834.40 for goods sold and delivered together with interest thereon at the rate of 8% per annum from 30 September 1986 to the date of realisation and costs of RM350. On 27 June 1989, the petitioner issued a notice under s. 218(2)(a) of the Companies Act 1965 demanding payment of the said sum from the company within twenty-one days of the service of the notice. The notice was sent to the registered address of the company by registered post. The company in its affidavit affirmed on 16 November 1989 admitted receiving the statutory notice, but it is not clear when the company received the notice. According to the same affidavit the company, through its solicitors sent a bank draft in the sum of RM24,184.48 cents to the petitioner on 20 October 1989 being payment of the principal sum and costs. Mr. R.V. Lingam, Counsel for the company conceded that the money was paid after the expiry of the period of twenty-one days stipulated in the notice.

Mr. Lingam submitted that the sum of RM24,184.48 was paid by the company to the petitioner in response to a letter written by the petitioner’s solicitors on 11 September 1989. He referred to a number of letters written between the company’s solicitors and the solicitor for the petitioner where both parties were negotiating a settlement. These letters were exhibited to the same affidavit.

Encik Nasrim, Counsel for the petitioner pointed out that these letters were not admissible as they were privileged documents. The first letter dated 24 July 1989 was written by the company’s solicitors and marked “without prejudice”. The subsequent letters, however, did not use the words “without prejudice”. Encik Nasrim contended that these letters were privileged documents because they formed part of a chain of correspondence originating from the letter dated 24 July 1989. In support of his contention he referred to a passage in an article written by Professor Mohd. Akram. See [1988] 1 CLJ (Rep) V. The passage is reproduced below:

Parties may quite properly define the occasions when they are communicating in this manner by the use of the phrase ‘without prejudice.’ To some extent the scope of the protection may be extended to cover other communication forming part of the same chain of correspondence by the other side’s tacit acceptance of the use of these words. Thus if the first series of letters is headed ‘without prejudice’ the privilege may still attach to the rest of the correspondence, though the latter may not be headed expressly. For example in the old case of *Paddock v. Forrestor*, a letter was written by one party ‘without prejudice’. The reply thereto was not stated to have been so written. The reply was also held to be inadmissible because as per Tindal CJ.

‘It is of great consequence that parties should be unfettered by correspondence entered into on the express understanding that it is to be without prejudice. It would be hard indeed to hold that a letter which is stated to be written without prejudice is admissible in evidence because the same terms are not adopted in the reply. When used in the letter containing the offer, the words ‘without prejudice’ must cover the whole correspondence.’

- a** I agree that the letters exhibited to the said affidavit are privileged documents. Privileged documents are admissible if both parties had reached a settlement. On the other hand if the parties had not reached settlement the privileged documents are inadmissible. In *Malayan Banking Berhad v. Foo Seen Moi* [1981] 2 MLJ 17 at p. 18, the Federal Court said at p. 18:

- b** It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is in order not to fetter but to enlarge the scope of the negotiations, so that a solution acceptable to both sides can be more easily reached. It is also settled law that where the negotiations conducted without prejudice lead to a settlement, then the letters become admissible in evidence of the terms of the agreement, unless of course the agreement has become incorporated in another document which would then be evidence of the agreement.

- c** In the instant case the parties did not reach settlement. The same affidavit stated that the petitioner refused to accept the bank draft sent on 20 October 1989 and it was returned to the company by the solicitors for the petitioner. Encik Nasrim in his submission confirmed that no settlement was reached between the parties. It is clear that the company failed to comply with the terms stated in the letter written by the solicitors for the petitioner on 11 September 1989. In the circumstances the letters are not admissible as evidence.

- d** Since the company failed to pay the petitioner the amount demanded in the statutory notice within the period of twenty-one days the company is deemed to be unable to pay its debts under s. 218(2) of the Companies Act.

- e** The company in the same affidavit claimed that it was ready and willing to settle its debts. It averred that it had a piece of industrial land held under title No. HS (M) 3461, PTN 7637 in the Mukim of Bukit Raja, Klang, Selangor which was valued at RM195,000 and which upon realisation would be more than enough to satisfy its debts. A copy of the document of title of the said industrial land was exhibited to the same affidavit. Looking at the document one can see that the land was charged to Southern Bank Berhad on 10 September 1988.

- f** From the company's affidavit, it appears that the only asset of the company is that piece of industrial land. In considering whether the company is able to pay its debts the Court must not ignore the other creditors of the company. Six of the creditors are supporting the petition while one creditor opposes the petition. When the petition was filed by the petitioner it was not for his own benefit but for the benefit of the other creditors as well. In *re Grigglestone Coal Company Ltd.* [1905] 2 Ch 327.

- g** ... that the order which the petition seeks is not an order for his benefit, but an order for the benefit of a class of which he is a member. The right *ex debito justitiae* is not his individual right, but his representative right. If a majority of the class are opposed to his view, and consider that they have a better chance of getting payment by abstaining from seizing the assets, then, upon general grounds and upon s. 91 of the Companies Act 1862, the Court gives effect to such right as the majority of the class desire to exercise. This is no exception. It is a recognition of the right, but affirms that it is for the majority to seek or to decline the order as best serves the interest of their class.

- h** It is a matter upon which the majority of the unsecured creditors are entitled to prevail, but on which the debtor has no voice.

In the present case all but one of the creditors are in favour of a winding-up order. The following are the names of the creditors and the amount of debt due to them.

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(1) The petitioner	RM24,184.48	a
(2) Gunac Enterprises Sdn. Bhd. (supporting).	RM48,692.64	
(3) Central Mercantile Corp. (M) Sdn. Bhd. (supporting).	RM 6,500.00	
(4) Family Self Service Laundry. (supporting).	RM10,652.00	
(5) Syarikat Ong Yoke Lin Sdn. Bhd. (supporting).	RM78,316.00	b
(6) Design 18 Sdn. Bhd. (supporting).	RM 1,000.00	
(7) Leong Kwong Contractor & Plank Merchant. (opposing).	RM56,327.52	
	<u>RM236,382.64</u>	
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The company claimed that it was able to realise RM195,000 from the said land but the land was charged to Southern Bank Berhad. There is no evidence how much the company owed Southern Bank Berhad. In any event it is evident that, even if the industrial land is sold, the company has no sufficient funds to pay its creditors. In my view the company is unable to pay its debts to its creditors. The Court should take into consideration the wishes of the majority of the creditors. They feel that it would best serve their interests if a winding-up order is made. **c**

In the circumstances I order that (a) the company be wound-up; (b) the official receiver be appointed as the provisional liquidator of the company and (c) the costs of the petition be paid out of the assets of the company. **d**

Also found at [1990] 2 CLJ 848

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